EXHIBIT 10
DATE 2/21/09
HB 40

January 21, 2009

House Natural Resource Committee

Testimony in support of and proposed amendments to HB 40.

WRSI Comments to HB 40

HB 40 in and of itself is a good start. It does not repair the water rights permit or change process. In a broader sense, WRSI is concerned with the diminution of existing water rights when the DNRC imposes volumes where none existed in the underlying water right. The volume limitations are supposedly calculated by determining the historic beneficial use of water. However, a water user may often have a water right diminished simply because historic (pre-1973) evidence of how water was used simply does not exist.

From a policy perspective, continued reductions in volume beneficially used, particularly in closed basins, short-change the State's ability to use and/or change these waters within the State. If this trend is allowed to continue to its logical conclusion, instream flows will be enhanced, but there will be a net loss in available water and Montana will become a net exporter of its historically used water to downstream States. As a result, there will be few, if any, options left to adequately address future water needs and the inevitable changes in water use patterns.

To accomplish this, amendments to HB 40 should be made which include:

(4) "Beneficial use", unless otherwise provided means:

(a) a use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural, stock water, domestic, fish and wildlife, industrial, irrigation, mining, municipal, power and recreational uses.

(i) use, is defined as the amount which is reasonably necessary for such purposes and based upon the amount actually needed;

(ii) historical beneficial use, is defined as the amount which has been determined by the Montana Water Court;

(New Section) "Historical Irrigation Consumptive Use" means the maximum amount of water used per the historically irrigated acres determined by the Montana Water Court or the Supreme Court Claims Examination Rules and calculated utilizing a scientific determination of evapotranspiration calculations.

Specific Comments on HB 40

Page 2 Line 27 (8) for the department to begin evaluating the information.

The question is, how does the department determine there is substantial credible evidence without evaluating the application? A ninety-day time limit should be imposed for making the determination of correct and complete. The bill does not solve the application processing problems of time limits and arbitrary decision-making by the DNRC..

Page 4 Line 18 What is the purpose in publishing a notice of receipt on the DNRC website? Seems like a waste of time and resources.

Page 4 Line 24 (ii) shall make a written preliminary determination as to whether or not the application satisfies the applicable criteria for issuance of a permit or change in appropriation right; The Department has unlimited time to contemplate correct and complete, which is unfair to all applicants.

Page 4 Line 28 (b) is a step in the right direction that it may ward off unnecessary objections.

The Montana Constitution affirmed and protected all existing water rights by stating in Article IX § 3:

> Water Rights. (1) All existing rights of the use of any water for any useful or beneficial purpose are hereby recognized and confirmed.

The question is how you determine the beneficial use of water and who ultimately is charged with that determination. From the beginning, water has historically been quantified by a flow rate. It was, and still is, easy to determine the rate at which one diverts water. The more difficult question is how much of that diverted water has been put to "beneficial use".

The Supreme Court grappled with this very issue in *McDonald vs. State of Montana*, Case No. 85-468, 220 Mont. 519, 722 P.2d 598 (1986). *McDonald* was filed in response to the Montana Water Court decreeing a volume quantification on direct flow irrigation rights. The Court held that:

> "... *We can also accept as true their contention that the volume of water used by irrigators up to or within the limit of their appropriation rights would vary greatly from year to year...*" (Case No. 85-468, Opinion at 6).

The Court ultimately determined that the extent of an appropriators right is that which is "reasonably necessary" for beneficial use. The Court ultimately ruled that:

> *" In so holding, we place no added burden on the owners of pre-July 1, 1973 irrigation water rights, nor do we offend the provisions of Art. IX, S 3 (11, of the 1972 Montana Constitution. Flow rate contained in*

Water Court decrees must still be expressed in cubic feet per second, as they had earlier been expressed, and in the long run the amount actually needed for beneficial use within the appropriation will be the basis, the measure and the limit of all water rights in Montana as between appropriators, and as between appropriators and others." (Case No. 85-468, Opinion at 16).

Based upon the Supreme Court's decision, the Montana Water Court no longer decrees specific volume quantifications on direct flow irrigation rights. However, the DNRC believes **it** can make such a determination and actually limits historic water rights to this amount even thought there is little or no "on the ground" evidence to support the amount of water historically used. This determination affects current water right owners who wish to change make a change to a water right and applicant for new permits for water uses.

When someone applies for a new permit under HB831, the applicant must determine how much water they will "consume" for the new proposed use. This amount must then be mitigated, by retiring or relinquishing an existing right for the same amount of water. To do this, the DNRC requires an Application to Change a Water Right. The DNRC Change Application process requires the applicant to prove the amount of the historic beneficial use of the right proposed to be changed.

Although the policy is sound, the DNRC's implementation of it is not. As stated in its rules, the DNRC refuses to be bound by either the Supreme Court or the Montana Water Court in determining the extent of a water right.

> *36.12.1902 CHANGE APPLICATION - HISTORIC USE*
> *(1) Final water court approved stipulations, master's reports, or examination information related to the water right being changed must be submitted with the application, however, this information or an abstract of a water right from the department or the Montana water court by itself is not sufficient to prove the existence or extent of the historical use.*

The DNRC has concluded the basis, measure and limit of a water right is the amount of water "consumed". The problem is how they determine this "consumptive use". The DNRC method of determining beneficial use keeps changing and the amount of water the agency will accept for historically consumed volume keeps decreasing. The acceptable figure is now less than the amount of water the NRCS has determined as necessary to produce a crop.

The DNRC has decided in the absence of proof the amount, timing and duration water applied to land over 35 years ago, they will utilize a formula based upon the average county crop production levels as of 1973 to calculate the consumptive use. The validity of these levels are questionable at best and a taking of a private property right at worst.

Therefore, to ensure compliance with the Montana Constitution and the Court decisions, the Legislature should define and give direction to the DNRC as to what is acceptable in determining historic beneficial use. The basic principles are that:

1. The DNRC should not be able to simply disregard the Montana Water Court's adjudication of existing water rights.

2. If the DNRC must determine a value for consumptive use, it should only utilize the best scientific calculations available to calculate this value and not use subjective crop production survey numbers. For instance, the NRCS has created a computer program that utilizes scientific calculations to determine irrigation requirements.
3. The DNRC's water right application processes should be examined by the Legislative auditor.

Included with this testimony is a letter that is one example of the shifting sands of DNRC policy. The application was subsequently denied as the applicant did not have the funds to proceed with a show cause hearing. The pond still exists, out of compliance, and without adverse affect. What has been accomplished?

The State of Montana owns the water for the use of its citizens. The DNRC does not own the water. The DNRC should administer a process that is fair, makes the best use of the State's resources, articulates what is needed and is objective.

WATER RIGHT SOLUTIONS, INC.

Providing Clients With A Total Water Solution

September 9, 2008

John Tubbs, Administrator WRD
Jan Langel, Operations Manager
P.O. Box 201601
Helena, MT 59634-1601

Dear John and Jan

This letter is in reference to Application to Change a Water Right No. 41QJ-30008614, originally filed by B&W Investment Co. LLC and now owned by Rob and Liz Dagnall.

This application was originally submitted to the Department on November 4, 2003, 4 years 8 months and 4 days prior to the date of termination. Our first letter from Mr. Beck was received March 11,2005. Our last response to DNRC was a letter to Jim Beck on May 4, 2005. The application was published with an objection deadline of May 14, 2007. On Thursday September 4, 2008, I received an e-mail from Mr. Langel that contained a Notice and Statement of Opinion, dated July 10, 2008 to deny the application. Neither the applicant or myself was noticed or given the opportunity to provide additional information or be noticed of the required hearing under 85-2-310(3)MCA

85-2-310 MCA in part;

(3) Except as provided in subsection (2), an application may not be denied or approved in a modified form or upon terms, conditions, or limitations specified by the department, unless the applicant is first granted an opportunity to be heard. If an objection is not filed against the application but the department is of the opinion that the application should be denied or approved in a modified form or upon terms, conditions, or limitations specified by it, the department shall prepare a statement of its opinion and its reasons for the opinion. The department shall serve a statement of its opinion by first-class mail upon the applicant, with a notice that the applicant may obtain a hearing by filing a request within 30 days after the notice is mailed. The notice must further state that the application will be modified in a specified manner or denied unless a hearing is requested.

The application as submitted on November 4, 2003, in my view, was correct and complete and a well documented application that complied with DNRC Policies at the time. The decision to deny was based on rules now currently in place and not the policies that were in place at the time the application was submitted.

85-2-302. Application for permit -- definition. (1) Except as provided in

1. 85-2-306 and 85-2-369, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or related distribution works except by applying for and receiving a permit from the department.

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(2) The department shall adopt rules that are necessary to determine whether or not an application is correct and complete, based on the provisions applicable to issuance of a permit under this part. The rules must be adopted in compliance with Title 2, chapter 4. (3) The application must be made on a form prescribed by the department. The department shall make the forms available through its offices.

(4) (a) Subject to subsection (4)(b), the applicant shall submit a correct and complete application. The determination of whether an application is correct and complete must be based on rules adopted under subsection (2) that are in effect at the time the application is submitted:

The objection deadline was June 13, 2007. No objections were received. A full 391 days had passed since the objection deadline, until the departments untimely denial on July 10, 2008.

85-2-310. Action on application for permit or change in appropriation right. (1) The department shall grant, deny, or condition an application for a permit or change in appropriation right in whole or in part within 120 days after the last date of publication of the notice of application if no objections have been received and within 180 days if a hearing is held or objections have been received. However, in either case the time may be extended upon agreement of the applicant or, in those cases where an environmental impact statement must be prepared or in other extraordinary cases, may be extended by not more than 60 days upon order of the department. If the department orders the time extended, it shall serve a notice of the extension and the reasons for the extension by first-class mail upon the applicant and each person who has filed an objection as provided by 85-2-308.

To quote Judge Brown in Bostwick Properties, Inc. vs. Montana Department of Natural Resources and Conservation page 23, paragraph 42, last sentence The DNRC's inaction and failure to comply with the plain and unambiguous terms of the statute is in violation of a clear legal duty." Inaction and failure by the Department is in my view clearly the case in this application.

In conclusion boys, save the tax payer and the department, the time and money spent on litigation. Summon your courage, admit the error and do the right thing. Issue the above referenced Authorization as per State law.

I remain sincerely,

David M. Schmidt, Principal
Senior Water Rights Specialist

cc. Rob Dagnall
bcc